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No. 97-1378

In The

Supreme Court of the United States

October Term, 1997

STATE OF SOUTH DAKOTA; WILLIAM J. JANKLOW, as Governor; JOYCE HAZELTINE, as Secretary of State; and MARK BARNETT, as Attorney General,

Petitioners,

vs.

SDDS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a separate case, the Court of Appeals for the Eighth Circuit declared unconstitutional a South Dakota statewide referendum which prohibited the development of an interstate landfill owned by Respondent and later, in ancillary proceedings, enjoined the Petitioners from relitigating in state court certain issues that had been decided against them in the federal suit. In the present case, the South Dakota Supreme Court held that the State was liable for taking Respondent's property in violation of the Fifth and Fourteenth Amendments and remanded the case for a state jury trial to determine damages. The questions presented are:

1. Whether the South Dakota Supreme Court's decision that the unconstitutional referendum effected a taking of Respondent's property, and remanding the case to the trial court to determine compensation, is a final judgment or decree reviewable by this Court under 28 U.S.C. § 1257.

2. Whether, on a petition for a writ of certiorari to review a decision of the South Dakota Supreme Court, this Court should entertain and decide a question of Eleventh Amendment immunity which was neither pressed nor passed upon in the state courts below.

3. Whether, if the question is properly before the Court, Eleventh Amendment immunity was waived, or if not, whether: (a) the federal court which held the referendum unconstitutional could effectuate that judgment by enjoining state officials from relitigating issues in state court; and (b) the federal court's unappealed decision, in which jurisdiction to issue the injunction was expressly determined, may be collaterally attacked in the present proceeding.

PARTIES TO THE PROCEEDING

The Petition accurately identifies the parties.

Respondent SDDS, Inc., a South Dakota corporation, has neither a parent nor a subsidiary.

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STATEMENT OF THE CASE

A restatement of the case is necessitated by inaccuracies and omissions in the State Defendants' statement.[1] To begin with, what shaped the decision below were not "unwarranted limits on state sovereignty," but rather, a long overdue vindication of the Fifth Amendment's takings clause. This case has far less to do with sovereign immunity than with a state-sponsored taking of property without just compensation. The unconstitutional taking is what brings the case here, not the Eleventh Amendment. It is also simply not true, as the State Defendants assert, that a federal court ordered the State of South Dakota "not to defend itself * * * in its own courts." As will once again be clear from a proper statement of the history of the case, the federal court's injunction only prevented the State Defendants from re-litigating two particular issues they had already litigated and lost in federal court — (1) whether SDDS had a property interest in a permit to operate Lonetree; and (2) whether the referendum was the proximate cause of SDDS's dissolution. *In re SDDS, Inc.*, 97 F.3d 1030, 1042 (8th Cir. 1996) ("*Lonetree IV*" as referred to by the State Defendants).[2]

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1. For simplicity, the Petitioners will be referred to as the "State Defendants" and the Respondent as "SDDS."

2. On these issues the State Defendants' were attempting to assign retroactive effect to the pronouncement of the South Dakota Supreme Court — two and one-half years after the referendum — that the permit SDDS was operating on at the time of the referendum was "void *ab initio*." But "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all * * * [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature * * *." *Hughes v. State of Washington*, 389 U.S. 290, 296-98 (1967) (Stewart, J., concurring). If attempting retroactively to extinguish a property interest in a permit was indeed the only defense the State had from takings liability, this clearly says more about the paucity of the defense than the breadth of the injunction.

The injunction was not only permissible, but necessary, if the Constitution of the United states is to be upheld.

While a chronicle of the case could properly begin in 1988 when SDDS acquired its land and began development of the Lonetree interstate landfill, the constitutional dimensions of the case really began to take shape in 1990 when a special interest group opposed to Lonetree sponsored a statewide ballot initiative designed to stop the project. At that time the initial one-year permit required for the project had already been granted, and Lonetree was approximately four months from going into operation. The anti-Lonetree initiative which was enacted into law in the November 1990 general election in South Dakota, however, forced Lonetree to shut down immediately and required further specific legislative authorization before it could proceed. The constitutionality of this discriminatory legislation was challenged by SDDS in state court on due process, equal protection and commerce clause grounds. According to the State Defendants, the court "ruled against SDDS." This is another misstatement. The South Dakota trial court, while ruling against SDDS on its equal protection and commerce clause claims (notwithstanding the court's finding that the initiative discriminated against interstate commerce), held that the retroactive application of the initiative, which was what had shut down Lonetree, violated the due process clause of the Fourteenth Amendment.[3]

In the meantime, doubtless much to the consternation of the architects of the initiative, the South Dakota legislature

3. *SDDS, Inc., et al. v. South Dakota*, Circuit Court. 6th Jud. Cir., Hughes County, South Dakota, Civ. No. 90-412 (Oct. 31, 1991). This unreported opinion was quoted in *SDDS, Inc. v. State of South Dakota*, 994 F.2d 486, 490 (8th Cir. 1993) (*Lonetree I in the nomenclature of the State Defendants' brief*), in pertinent part, as follows: "* * * the Initiated Measure does violate the Due Process Clause of the United States and South Dakota Constitutions to the extent it required an immediate suspension, without notice or opportunity to be heard, of SDDS' right to operate the Lonetree facility under the September, 1989 permit."

enacted, and the Governor signed, the legislation authorizing Lonetree to proceed. Before the bill would have become effective on July 1, 1991, however, the opponents of Lonetree obtained sufficient signatures to refer the legislative approval of Lonetree to a vote at the 1992 general election. In the statewide vote on the referendum, the legislative approval of Lonetree was "vetoed," thus effectively destroying Lonetree.[4]

Meanwhile, on November 5, 1991, SDDS commenced an action in the United States District Court for the District of South Dakota against the State of South Dakota and its Governor and other named state officials seeking a declaratory judgment that the referendum violated SDDS's rights to due process and equal protection of the law, and interfered with interstate commerce, all in contravention of the Constitution of the United States. There have since been three final and unappealed judgments entered by the Eighth Circuit in that declaratory judgment action which are now being collaterally attacked by the State Defendants on Eleventh Amendment grounds in the present case. But the State Defendants were at all times, for the past six years, *consenting* participants in the federal court proceedings. Indeed, in their answer to the original complaint,

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4. The State Defendants say the referendum only "restricted the operation of a large-scale waste disposal facility on SDDS's property." *Petition*, p.2. This is a major understatement. The referendum "effectively vetoed" Lonetree's legislative approval, and "* * * the Lonetree project has been unable to proceed since." *Lonetree I*, 994 F.2d at 489. The State Defendants eventually conceded, after having first urged the contrary, that "[t]he practical effect of the referendum was to prohibit the construction" of Lonetree. *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 270 n.10 (8th Cir. 1995) ("*Lonetree III*" as referred to in the State Defendants' brief). This was of course why — after the State Defendants then turned around in state court and contended that the referendum was not the proximate cause of SDDS's injury -- that the Eighth Circuit directed the entry of an injunction to prohibit the State Defendants from relitigating whether the referendum "was the proximate cause of SDDS'S dissolution." *Lonetree IV*, 97 F.3d at 1042.

the State Defendants expressly *waived* the Eleventh Amendment in connection with the declaratory and prospective injunctive relief that was being sought and only invoked sovereign immunity "to the extent [the complaint] can be construed to involve a claim for monetary relief * * *"[5] Consistent with this clearly expressed partial waiver, the State itself, along with the individual state officers named as defendants, engaged in a lengthy but unsuccessful battle to uphold the referendum's constitutionality, never once during this time ever suggesting that the Eleventh Amendment barred SDDS's suit for declaratory and prospective injunctive relief.

The State Defendants, accordingly, neither invoked the Eleventh Amendment nor appealed the Eighth Circuit's 1993 decision which reversed the summary judgment granted in their favor and remanded the case to the district court "for a full explication of SDDS's federal constitutional claims." *Lonetree I*, 994 F.2d at 494.[6] Nor did the State invoke the Eleventh Amendment when it was ordered to pay SDDS's attorney fees pursuant to 42 U.S.C. § 1988. Likewise, in 1995 the State Defendants neither claimed sovereign immunity nor appealed when the Eighth Circuit reversed the second summary judgment in their favor and held that referendum was unconstitutional because it was "discriminatory [in] purpose and * * * effect," "does not appreciably advance any legitimate local interest," and "violates the dormant aspects of the commerce clause of

5. Defendants' Answer ¶ 24, *SDDS, Inc. v. State of South Dakota*, Civil No. 91-5121 (D.S.D.), filed November 27, 1991.

6. Thus rejecting the State's contention — which had been adopted by the district court — that the earlier state trial court decision holding that the initiated measure was *prospectively* constitutional, see note 3 *supra*, was "dispositive" of SDDS's constitutional challenge of the referendum. "A different due process issue faced the district court than the due process issue which faced the state court * * *" *Id.* The Court explained that by the time of the referendum SDDS had "secured" a five-year renewal permit and obtained legislative approval to operate the Lonetree facility. *Id.*

the United States Constitution." *Lonetree III*, 47 F.3d at 272. Nor did the State invoke immunity when it was once again ordered to pay SDDS's attorney fees.

It was not until the 1996 ancillary proceeding that the State Defendants interposed any Eleventh Amendment objection. Even then, however, the argument was not that there was a complete lack of jurisdiction over the State itself, but simply that the prospective injunctive relief sought by SDDS exceeded the limits allowed under the Eleventh Amendment and the Anti-Injunction Act's relitigation exception. In response to this, the Eighth Circuit noted that the State Defendants did not contend that the prior decision declaring the referendum unconstitutional had violated the Eleventh Amendment, and that any such contention would necessarily have been unsuccessful, since —

> [a]s a suit for prospective declaratory relief from South Dakota's ongoing violation of the dormant commerce clause, the Defendants could not have enjoyed immunity under the Eleventh Amendment.

Longtree IV, 97 F.3d at 1035 (citing *Ex Parte Young*, 209 U.S. 123, 159 (1908)). The State Defendants did not appeal and have never until the present collateral attack disputed that holding.

The Eighth Circuit went on in its 1996 decision to hold that the Eleventh Amendment does not bar an ancillary proceeding "for injunctive relief to prohibit a state defendant from relitigating in a state court issues previously decided in a federal court," and that the relitigation exception to the Anti-Injunction Act was designed to permit just such a result based on "well-recognized concepts of *res judicata* and collateral estoppel." *Lonetree IV*, 97 F.3d at 1036-37. The Court of Appeals expressly rejected the State Defendants' argument, based on *Green v. Mansour*, 474 U.S. 64 (1985), that granting such relief

would be tantamount to a "demand that this Court direct the South Dakota courts to grant SDDS a monetary award to be paid from the South Dakota state treasury," since unlike *Green*, which was an action to remedy an alleged past violation of constitutional rights,

> the suit before us has been brought to effectuate our judgment in [*Lonetree III*], a "[r]emed[y] designed to end a continuing violation of federal law [which was] necessary to vindicate the federal interest in assuring the supremacy of that law."

Lonetree IV, 97 F.3d at 1036 n.7 (quoting *Green*, 474 U.S. at 68).

The State Defendants again chose not to appeal this crucial 1996 decision by the Eighth Circuit, and the resultant injunction that issued against them, despite the connection they obviously saw between the issues that had been decided against them in that case and the issues they were at that very moment attempting to relitigate in the ongoing state inverse condemnation case.[7] This deliberate election not to appeal leaves the decision of the Eighth Circuit beyond challenge at this time. Indeed, although the State Defendants devote a lengthy footnote in their brief to criticizing it, they now in fact concede that "the validity of this holding is not at issue here * * *" *Petition*, p.5, n.5.

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7. The State Defendants were aware of this connection from the beginning and had in fact tried to use it to their own advantage when they argued, in opposing a grant of attorney fees after the referendum had been declared unconstitutional, that SDDS had "obtained a judgment which can do it no good" in the inverse condemnation case because the Eighth Circuit had "let stand" the district court's ruling that SDDS "had no property interest which could be unlawfully taken." *Lonetree IV*, 97 F.3d at 1036 n.6. The Eighth Circuit held, however, that contrary to this reading of its prior decision "we did not 'let stand' any portion of the district court decision * * *; rather, we reversed the district court, and remanded the case * * * with instructions to enter judgment in favor of SDDS." *Id.*

Just how, then, the State Defendants would have this Court review the matter is the essential question left unanswered in their petition. The novel theory they have contrived is that the South Dakota Supreme Court committed reversible error when it accorded controlling finality to the issues determined by the Eighth Circuit. There are several problems with this, not the least of which, as the South Dakota Supreme Court noted, is that this is precisely what was mandated by time-honored principles of comity, *res judicata,* and collateral estoppel, as well as the supremacy clause itself.

> This holding pointedly curtails our examination of the subject. Federal court power to enjoin a party from relitigating an issue in state court previously decided in a federal forum is clear. It stems from the Anti-Injunction Act, 28 U.S.C. § 2283, which reinforces the federal interest in assuring appropriate supremacy under the Constitution. * * * It is founded in the well-recognized concepts of res judicata and collateral estoppel.

State Defendants' *App.* 7a-8a (footnote and citations omitted).

Moreover, if there was any error in this regard, it was incumbent on the State Defendants to bring it to the South Dakota Supreme Court's attention in a timely manner, rather than remaining silent, as they did, until it was too late for the court to pass on the question. On December 23, 1996, the South Dakota Supreme Court entered an order directing the parties to file supplemental briefs

> addressing the impact of the mandate issued in [the] federal action upon the issues on appeal before this Court and enumerating with specificity what issue or issues, if any, remain before this Court on appeal and also addressing whether this appeal should be dismissed.

Despite this request by the court for guidance, the State Defendants stood mute, and instead of submitting a brief "addressing the impact" of the Eighth Circuit's decision, as they were directed to do, the State Defendants filed a written "statement" in which they advised the South Dakota Supreme Court that they were "constrained" by the federal mandate from saying anything. This, of course, was untrue, and while the State Defendants were constrained from relitigating two narrowly defined issues, they remained free to advise the court of anything else that might bear upon the immediate question of the "impact" of the federal decision on the issue of takings liability that was pending before the state court. Certainly Eleventh Amendment immunity might have been such a matter.

If the State Defendants had then genuinely believed — as they are now contending in this Court — that the Eleventh Amendment rendered the proceedings in the federal court absolutely void, they would surely have advised their own state supreme court of this important bit of intelligence. Instead, they declined even to file a brief or submit oral argument. Even after the state supreme court acted, the State Defendants made no mention of the Eleventh Amendment in their petition for rehearing, which was confined to other matters of no pertinence here. The State Defendants' studied refusal to say anything about the Eleventh Amendment at the time the case was before their own state supreme court is utterly inconsistent with their present posture in this Court. The ineluctable conclusion is that the State Defendants always understood that they had no bona fide Eleventh Amendment defense — that if indeed such a defense was ever available, it had long since been waived. Either that or they deliberately sacrificed their own supreme court, like a pawn in an opening gambit, to mount a collateral attack on long-ago final federal court judgments.

REASONS FOR DENYING THE WRIT

This case does not meet any of the criteria for certiorari review by this Court of a decision by the highest court of a state, including those having to do with jurisdiction. There has been no final judgment rendered in the matter by the South Dakota Supreme Court, to which the writ is sought. Nor was the federal question posited for review ever pressed or passed upon in the state court. The petition is in reality an impermissible collateral attack on three long since final judgments of the Court of Appeals for the Eighth Circuit. The Eleventh Amendment was in any event no bar to the federal case in which the State of South Dakota was at all times a nominal *consenting* participant and in which the relief granted was confined to declaratory and prospective injunctive relief from an ongoing violation of the Constitution and, in an ancillary proceeding, to effectuate the judgment of a federal court by enjoining the defendants from relitigating issues previously decided against them in the federal suit. The argument that follows will briefly address each of these deficiencies in the petition and discuss other related reasons for denying the petition.

I.

THE DECISION OF THE SOUTH DAKOTA SUPREME COURT IS NOT A FINAL JUDGMENT.

The Court's review of state court decisions is limited by 28 U.S.C. § 1257(a) to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." A state court judgment is final if it is "* * * an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n. of California*, 324 U.S. 548, 551 (1945). The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor for the smooth working of our federal system." *Jefferson*

v. City of Tarrant, Alabama, __ U.S. __, 118 S. Ct. 481, 486 (1997) (quoting *Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120 (1945)).

The South Dakota Supreme Court's decision is not a "final judgment" subject to review under 28 U.S.C. § 1257(a). It determined only that the State of South Dakota was liable to SDDS for taking its property in violation of the Fifth and Fourteenth Amendments and "* * * therefore remand[ed] the case to the circuit court for a jury's determination of what, if any, damages SDDS suffered at the hands of the State." State Defendants' *App.* 13a. Far from ending the litigation, the South Dakota Supreme Court determined only the liability portion of the takings equation and remanded the case to the trial court for a jury determination of just compensation.

State court decisions, such as that of the South Dakota Supreme Court, which determine only that property has been taken in violation of the Fifth and Fourteenth Amendments, but which leave the issue of just compensation for future determination, are "classic" examples of non-reviewable decisions. *See San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 632-633 (1980), wherein the Court noted:

> Ever since this Court's decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37 S. Ct. 295, 61 L. Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station*

> *WOW, Inc. v. Johnson*, 326 U.S. 120, 127, 65 S. Ct. 1480, 89 L. Ed. 2092 (1945). This is because "the federal constitution question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163, 94 S. Ct. 407, 412, 38 L. Ed. 2d 379 (1973).

See also Catlin v. United States, 324 U.S. 229 (1945); *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62 (1948); *O'Dell v. Espinosa*, 456 U.S. 430 (1982); and *Bruce v. Tobin*, 245 U.S. 18 (1917).[8]

The State Defendants argue in footnote 6 of their petition that the decision of the South Dakota Supreme Court is final and reviewable because it falls within the fourth category of judgments identified as final for purposes of review in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1967). The Court in *Cox*, however, specifically recognized that

> [i]n most, if not all, of the cases in these [four] categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date.

420 U.S. at 477. The Court then cited interlocutory eminent domain decisions as being different and non-reviewable:

> Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal

8. The South Dakota Supreme Court has similarly held that, in condemnation cases, orders determining only the necessity of a taking but not assessing just compensation are interlocutory only and not subject to appeal as a matter of right. *South Dakota Department of Transportation v. Freeman*, 378 N.W. 2d 241 (S.D. 1985).

> question with another federal question to be decided later. For in those cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem (citations omitted).

Id., 420 U.S. at 477, n.6.

The decision of the South Dakota Supreme Court is clearly not reviewable under 28 U.S.C. § 1257(a) at this stage of the proceeding. Until a state jury determines the just compensation due SDDS for the taking, and the South Dakota Supreme Court issues its judgment on that issue thereby concluding both aspects of the takings case, review should be denied.

II.

THE FEDERAL ISSUE WAS NOT PRESSED OR PASSED UPON IN THE STATE COURT.

The State Defendants assert that the Supreme Court of South Dakota erred in holding that it was bound by the Eighth Circuit's judgment because the Eleventh Amendment rendered that judgment void. Since the State Defendants never raised this federal question before the state courts of South Dakota nor did those courts consider and decide the issue, review by this Court should be declined.

The jurisdiction of this Court to review the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897). A federal claim cannot be considered by the Court unless it has been either properly raised in the state court or considered and

expressly passed upon by the state court. *Cardinale v. Louisiana*, 394, U.S. 437 (1969) and *Webb v. Webb*, 451 U.S. 493 (1981). This is a threshold burden of the State Defendants, codified in the Court's Rule 14.1(g). Contrary to the requirements of the Rule, the State Defendants' statement of the case fails to specify when the Eleventh Amendment issue sought to be reviewed was raised in the South Dakota Supreme Court, the manner of raising it, and the way it was passed on by the state court. It was not.

The State Defendants' failure to raise the Eleventh Amendment claim in the state court was certainly not due to a lack of opportunity. Immediately after the Eighth Circuit's judgment was issued, the South Dakota Supreme Court ordered that SDDS and the State Defendants submit supplemental briefs addressing the impact of the federal court decision. Even though the jurisdiction of the federal court to enter an injunction against the State Defendants was clearly not an enjoined issue, the State Defendants declined to submit a supplemental brief. Following the issuance of the South Dakota Supreme Court's decision, the State Defendants filed a petition for rehearing that never mentioned the Eleventh Amendment nor questioned in any manner the jurisdiction of the federal court to enter the injunction against the State Defendants.

As a consequence of the State Defendants' failure to raise the federal claim, it was not considered and decided by the state court. This Court has repeatedly stated that when —

> the highest court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969); *Fuller v. Oregon*, 417 U.S. 40, n.11 (1974); and *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). Nowhere in the decision of the South

Dakota Supreme Court is the Eleventh Amendment or any other immunity even mentioned, let alone expressly considered. Unless the state court expressly passes upon the federal question as the result of a "real contest" on the point, there cannot be review in this Court. *Illinois v. Gates*, 462 U.S. 213 (1983) and *Beck v. Washington*, 369 U.S. 541 (1962).

III.

THE ELEVENTH AMENDMENT WAS NOT A BAR TO THE ACTION IN FEDERAL COURT.

The federal court action which was commenced in 1991 sought only declaratory and prospective injunctive relief from an unconstitutional statewide referendum that was designed to stop the operation of the Lonetree landfill. Neither that action nor the subsequent ancillary proceeding to effectuate the judgment declaring the referendum unconstitutional was barred by the Eleventh Amendment. The State Defendants overstate their case in relying on "black letter law" that an *unconsenting* state may never be named as a defendant in federal court. What they omit to mention is that in the present case the State of South Dakota *consented.* Even without that consent, the declaratory and prospective relief that was granted against state officials fits within well-recognized exceptions to a state's sovereign immunity, and was just as effective then, as it is now, whether or not the state itself is also named as a defendant.

A. The State Expressly Waived Any Eleventh Amendment Defense It May Have Had.

The bar of the Eleventh Amendment is not absolute and, like any other privilege, may be waived. *Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273, 284 (1906). The State Defendants boldly assert that the waiver can only be effected by statute. This is a misstatement of the law. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959) (The Eleventh

Amendment " * * *is an immunity which a State may waive at its pleasure * * * as by a general appearance in litigation in a federal court [citations omitted] or by statute [citations omitted]").[9] The state's own practice in such matters can suffice to support a waiver. *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975).

It appears that South Dakota's practice with respect to federal suits in which it chooses to participate in order to defend or vindicate an important policy of the state, and where only declaratory and prospective injunctive relief is sought against the state, has been to waive sovereign immunity through an express waiver in the answer filed under the authority of the State's Attorney General. SDCL 1-11-1(2) makes it the duty of the Attorney General,

> [w]hen requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, ***in any court*** or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested.

(Emphasis supplied).

The present case is by no means the only time the State's Attorney General has appeared and filed such a waiver. For a recent example of another such case in this Court, decided this

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9. The State Defendants read too much into cases such as *Atascadero v. Scanlon*, 473 U.S. 234 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945), which they cite for the proposition that immunity may only be waived by statute. None of these cases involved an express waiver such as was made in the State's answer in the present case. To the contrary, in each of them the state or its officials had at some juncture, at least on appeal if not earlier, invoked immunity. There is an obvious difference between an express written waiver, as in the present case, and attempting to imply waiver in the absence of manifested consent.

term, *see South Dakota v. Yankton Sioux Tribe*, __ U.S. __, 118 S. Ct. 789 (1998).[10]

Similarly, in the present case, when the State filed its answer to the complaint in the original federal suit in 1991, it expressly waived Eleventh Amendment immunity to the extent that the action was one for declaratory and prospective injunctive relief. South Dakota is, therefore, not an *unconsenting* state entitled to invoke its sovereign immunity at this time. To hold otherwise would only denigrate the "dignity and respect afforded a State, which the immunity is designed to protect," *Idaho v. Coeur d'Alene Tribe of Idaho*, __ U.S. __, 117 S. Ct. 2028, 2033 (1997), by allowing a state to play games with the Eleventh Amendment to manipulate federal courts and litigants by first consenting to suit, then litigating to achieve a desired result, and finally, after the end of the case, withdrawing its consent, or not, depending on its satisfaction with the outcome.

In any event, this part of the State Defendants' argument, the notion that a federal judgment against a state is always "void" in the absence of a statutory waiver of immunity, regardless of how plainly in a particular case the state may have expressed its consent to be bound, is in the final analysis a moot point, since had South Dakota never been joined as a defendant in its own name, or if at some point it is simply dropped from the case because it is immune, a valid suit nonetheless remains against the state officials in this case under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The "continuing validity" of this doctrine was reaffirmed by this Court as recently as last term in *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2034. The applicability of the *Young* doctrine in the present case is beyond dispute, at least as concerns the original suit in federal court for

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10. In that case, like the present one, the answer filed by the State of South Dakota in the United States District Court for District of South Dakota, expressly waived the State's right to invoke the Eleventh Amendment. Answer of State of South Dakota ¶ V, filed November 7, 1994. Civ. No. 94-4217.

declaratory and prospective injunctive relief from the unconstitutional referendum on Lonetree.

> [T]he use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity.

Ex Parte Young, 209 U.S. at 159. The doctrine's continued applicability in the ancillary proceeding that followed will be discussed next.

B. The Injunction Was Properly Granted in Ancillary Proceedings Pursuant To Ex Parte Young And The Relitigation Exception of the Anti-Injunction Act.

The State Defendants' challenge *Ex Parte Young*'s application to the ancillary proceeding in which they were enjoined from relitigating issues that had been decided against them in the original action on the theory that since *Young* applies only in the case where prospective relief is sought from a "continuing violation" of federal rights, and that since the referendum had already been declared unconstitutional, there was no continuing violation to enjoin, or so the argument goes. The argument is much too clever, however, assuming, as it does, the very thing it sets out to prove, namely that an attempt by the State Defendants to circumvent the decision of the Eighth Circuit by relitigating in state court issues previously decided in the federal court is not a "continuing violation" of federal rights. The Court of Appeals for the Eighth Circuit rejected this as an "intolerable result," one that would render the decision of federal courts "largely nugatory and advisory." *Lonetree IV*, 97 F.3d at 1035-36. The Eleventh Amendment envisions no such demeaning of the judicial power of the United States.

It has thus always been clear, at least since *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273 (1906), that where

state defendants have been properly sued for a violation of federal rights, the court that declared such rights in the first instance retains jurisdiction, in an ancillary proceeding, to enforce by injunction the requirements of its prior decree, and this is in no way forbidden either by the Eleventh Amendment or the Anti-Injunction Act.

> None of the prohibitions * * * of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination.

Id., 200 U.S. at 292. *See Mitchum v. Foster*, 407 U.S. 225, 235 (1972); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (The reenacted relitigation exception has its "genesis in *Ex Parte Young* * * * [and] permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988) ("The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel.") Such concepts are fully binding on the states in respect of matters federally adjudicated. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

As this Court has explained,

> the availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the * * * supremacy of that law.

Green v. Mansour, 474 U.S. 64, 68 (1985). The State Defendants attempt to limit *Ex Parte Young* in the manner suggested in their petition would relegate federal judgments to no more than precatory effect.

IV.

THE DECISION OF THE EIGHTH CIRCUIT IN WHICH THE FEDERAL ISSUE WAS RAISED, LITIGATED, LOST AND LEFT UNAPPEALED, MAY NOT NOW BE COLLATERALLY ATTACKED.

Conceding that ordinarily the result of an unappealed adverse decision may not be relitigated in a collateral proceeding, when the issue of subject matter jurisdiction was litigated and lost, the State Defendants argue that Eleventh Amendment immunity, partaking of notions of sovereign immunity, may *always* be raised collaterally, even if actually litigated and left unappealed. This is because, the State Defendants say, such judgments are always void. The State Defendants' argument, however, simply goes too far.

The district courts and courts of appeal have both power and obligation to decide issues presented in proceedings before them. Congress has conferred each with jurisdiction to determine both federal constitutional as well as federal statutory questions. 28 U.S.C. §§ 1291, 1331. In *Lonetree IV* the Eighth Circuit expressly determined that it had jurisdiction to issue the injunction. This Court has quite routinely held that where such determinations are made adversely to a litigant and left unappealed, allegations of error are necessarily subsumed in their finality. *Durfee v. Duke*, 375 U.S. 106, 111-115 (1963). Illustrating this principle, the Court in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), commented:

> Courts to determine the rights of parties are an integral part of our system of government. It is just

> as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

While the Court in *Durfee*, *supra*, to be sure, commented that "[d]octrines of federal pre-emption or sovereign immunity may in some contexts" dictate otherwise, *id.*, 375 U.S. at 114, this Court's historical treatment of the issue has never suggested that an otherwise final and unappealed judgment rejecting claims of Eleventh Amendment immunity, *as in this context*, involving a prior, reasoned application of the *Ex Parte Young* exception to Eleventh Amendment immunity, should be treated as anything other than one validating the Court's longstanding view favoring finality. Notably, for example, the State Defendants nowhere in their Petition suggest any circumstance which would have prevented them from taking a direct appeal of *Lonetree IV*, or why their apparent determination at the time not to take a direct appeal justifies the uncertainty which they now claim forever attaches to the Eighth Circuit's decision in *Lonetree IV*. The Court's normal view, under these facts, is the right one to be applied here. *Jackson v. Irving Trust Co.*, 311 U.S. 494, 503 (1941); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 378 (1940).

The State Defendants' reliance on such cases as *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), and *Kalb v. Feuerstein*, 308 U.S. 433 (1940), is misplaced. *United States Fidelity & Guar. Co.* involved an action in which a surety company sought to set up as a bar to claims by the United States a judgment it had obtained in a United States District Court against an Indian tribe for which the United

States had acted as trustee. The Court held that Congress had not consented to consideration of the surety's claims in the court in which the judgment had been rendered and that the judgment in question was therefore open to collateral attack. Eleventh Amendment immunity was not an issue in that case, but just as importantly, and unlike that here, the issue of the claimed immunity to judgment asserted by the United States had neither been raised nor litigated in the court in which the judgment was originally entered.

Kalb is even wider of the mark. There, the Court determined on appeal from the Wisconsin Supreme Court that the Wisconsin state trial court lacked jurisdiction to confirm a farm foreclosure and to eject the foreclosed farmers, who were petitioners in bankruptcy. *Kalb* involved a direct appeal, and merely held that the state court proceedings giving rise to the appeals could be collaterally attacked in the federal bankruptcy court under that court's plenary powers conferred by federal bankruptcy statutes.

As part of its concluding collateral attack on *Lonetree IV*, the State Defendants contend in the last section of their Petition that the South Dakota Supreme Court was itself effectively, and unlawfully, enjoined at the instance of the Eighth Circuit, because the South Dakota Supreme Court had held it was "bound" by *Lonetree IV.* However, it was not just the "* * *[re-litigation] exception to the Anti-Injunction Act, * * *" but also "* * * principles of comity, *res judicata* and collateral estoppel * * *" by which that court considered its consideration curtailed. State Defendants' *App.* 8a. The South Dakota Supreme Court's holding in this respect, however, was clearly not that it was enjoined, but simply an accurate application of governing preclusion principles under either federal or state law. *Parsons Steel, Inc. v. First Ala. Bank*, 174 U.S. 518, 524 (1986); *Moe v. Moe*, 496 N.W. 2d 593, 595 (S.D. 1993).

Any other result would allow a litigant who chose to raise and to urge Eleventh Amendment immunity, on the one hand, and, despite a resulting adverse determination as to which the losing litigant also chose not to seek direct review, on the other, to escape the consequences of collateral estoppel and *res judicata*. As the Eighth Circuit held in rejecting the State Defendants' similar claims that no *res judicata* or collateral estoppel effect attached to its decision in *Lonetree III*, one applicable with equal force in the context of the *Ex Parte Young* exception to Eleventh Amendment immunity, any other result would render otherwise final judgments of the federal courts "* * * largely nugatory and advisory * * * ," leading to an "intolerable result, * * * not * * * mandated by the Eleventh Amendment." *Lonetree IV*, 97 F.3d at 1035-1036. The unstable and legally unsavory result from holding such decisions as *Lonetree IV* void should not obtain here.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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